

UNITED STATES DISTRICT COURT

Northern District of California

San Francisco Division

MUSIC GROUP MACAO COMMERCIAL
OFFSHORE LTD., *et al.*,

No. 14-mc-80328 LB

Plaintiffs,

ORDER ENFORCING
SUBPOENA

v.

JOHN DOES I-IX,

Defendants.

INTRODUCTION

The plaintiffs seek to enforce a subpoena against nonparty Twitter, Inc. That subpoena would compel Twitter to reveal identifying information for the anonymous Twitter users who are the Doe defendants. The district court for the Western District of Washington has already ruled that the plaintiffs may obtain that information. (ECF No.2 at 30-33.)¹ The only issue before this court is whether the subpoena unduly infracts the Doe defendants' First Amendment right to speak anonymously. For the reasons stated below, and on this record, the court holds that the plaintiffs' need for the requested information outweighs any harm that will be done to the defendants' First Amendment rights. *See, e.g., Perry v. Schwarzenegger*, 591 F.3d 1126 (9th Cir. 2009). The court thus grants the plaintiffs' motion and enforces the subpoena. The court denies as moot the plaintiffs'

¹Record citations are to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the tops of the documents.

1 motion (ECF No. 3) to transfer this subpoena-related motion to the United States District Court for
2 the Western District of Washington. The court also sets out procedures to safeguard the Doe
3 defendants' First Amendment rights.

4 The court finds this matter suitable for determination without oral argument and vacates the
5 hearing that is set for January 8, 2015. *See* Civ. L.R. 7-1(b).

6 **STATEMENT**

7 The underlying case is primarily one for defamation with attendant claims for copyright
8 infringement, unfair competition, and breach of contract. (*See* Complaint - ECF No. 2 at 5-19.) The
9 plaintiffs, whom the court will collectively call "Music Group," filed this case against John Doe
10 defendants in the United States District Court for the Western District of Washington. (*Id.*) Music
11 Group alleges in sum that the defendants have used anonymous accounts on the Internet service
12 Twitter — under the account names *@FakeUli* and *@NotUliBehringer* — to "publish disparaging
13 remarks about" Music Group, its employees, and its CEO, Uli Behringer. (ECF No. 1 at 3.)
14 According to Music Group, the Doe defendants have used these accounts to make "malicious,
15 defamatory statements, which the [defendants] knew to be untrue"; this includes claiming that Music
16 Group "designs its products to break in 3-6 months," that Music Group "encourages domestic
17 violence and misogyny," and that the company's CEO, Mr. Behringer, "engages with prostitutes."
18 (*See* ECF No. 1 at 7.)

19 Because the relevant Twitter accounts are anonymous, Music Group has not been able to serve
20 process on the defendants. Music Group has thus subpoenaed Twitter (who is not a party to this suit)
21 to reveal the identities of the *@FakeUli* and *@NotUliBehringer* users so that it can serve the
22 complaint on them. More precisely, Music Group's subpoena would have Twitter produce "the
23 name, address, email address and any proxy address" of the accounts' owners. (ECF No. 1 at 3;
24 ECF No. 2 at 35, 41-45 (subpoenas).)

25 The Washington district court has already granted Music Group expedited discovery to
26 determine the identities of the Doe defendants. (ECF No. 2 at 30-33.) The Washington court held
27 that Music Group had shown "good cause" for the requested discovery. (*Id.*) Given that order,
28 Music Group subpoenaed Twitter for the identifying information. (ECF No. 2 at 35, 41-45.) So far,

1 Twitter has not produced information in response. “Moreover,” according to Music Group,
 2 “although the Court in [Washington] has issued the order for early discovery, Twitter [which is
 3 headquartered in San Francisco] would not agree to have the Court in [Washington] decide” a
 4 motion to compel compliance with the subpoena. (ECF No. 2 at 2, ¶ 5.)

5 Music Group then filed this miscellaneous proceeding, asking this court to enforce the subpoena.
 6 (ECF No. 1.) Twitter “takes no position on the merits” of Music Group’s motion. (ECF No. 12 at 2
 7 and n. 1.) Twitter states only that this court must make the necessary legal analysis “to ensure that
 8 the appropriate First Amendment standard is met and that the [Doe defendants’] right to anonymous
 9 free speech is protected.” (*Id.*) Twitter also says that, if the court rules in Music Group’s favor, it
 10 will respond to the subpoena. (*Id.*)

11 GOVERNING LAW

12 “It is well established that the First Amendment protects the right to anonymous speech.” *Art of*
 13 *Living Found. v. Does 1-10*, No. 10-5022, 2011 WL 5444622, *3 (N.D. Cal. Nov. 9, 2011) (citing
 14 *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995)). “However, the right to anonymity
 15 is not absolute.” *Art of Living*, 2011 WL 5444622 at *4. “Where anonymous speech is alleged to be
 16 unlawful, the speaker’s right to remain anonymous may give way to a plaintiff’s need to discover the
 17 speaker’s identity in order to pursue its claim.” *Id.*

18 In *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140-41 (9th Cir. 2009), the Ninth Circuit described
 19 the following two-part framework for analyzing claims of “First Amendment privilege” in the
 20 context of discovery requests:

21 The party asserting the privilege must demonstrate a *prima facie* showing of arguable first
 22 amendment infringement. This *prima facie* showing requires [the requesting party] to
 23 demonstrate that enforcement of the discovery requests will result in (1) harassment,
 24 membership withdrawal, or discouragement of new members, or (2) other consequences
 25 which objectively suggest an impact on, or “chilling” of, the members’ [First Amendment]
 26 rights. If [the party opposing discovery] can make the necessary *prima facie* showing, the
 27 evidentiary burden will then shift to the [party seeking discovery] to demonstrate that the
 28 information sought . . . is rationally related to a compelling governmental interest and the
 least restrictive means of obtaining the desired information. More specifically, the second
 step of the analysis is meant to make discovery that impacts First Amendment . . . rights
 available only after careful consideration of the need for such discovery, but not necessarily
 to preclude it.

Id. at 1140 (quotations, citations, and alterations omitted); see *Drummond Co. v. Collingsworth*,
 2013 WL 6074157, *12 (N.D. Cal. Nov. 18, 2013) (applying *Perry* to subpoena seeking identity of

1 anonymous Internet-service users); *Chevron Corp. v. Donziger*, 2013 WL 1402727 (N.D. Cal. Apr.
2 5, 2013) (same).

3 The ultimate question under *Perry* “is whether the party seeking discovery has demonstrated an
4 interest in obtaining the disclosures . . . [that] is sufficient to justify the deterrent effect on the free
5 exercise of the constitutionally protected right” *Id.* at 1140 (quotations and alterations omitted).
6 “To implement this standard,” the court must “balance the burdens imposed on [the] individuals
7 [from whom discovery is sought] against the significance of the . . . [requesting party’s] interest in
8 disclosure, to determine whether the interest in disclosure . . . outweighs the harm” to the
9 constitutionally protected right. *Id.* (quotations and citations omitted). This “balancing test” takes
10 “several factors into account,” such as “the importance of the litigation,” “the centrality of the
11 information sought to the issues in the case,” “the existence of less intrusive means of obtaining the
12 information,” “and the substantiality of the First Amendment interests at stake[.]” *Collingsworth*,
13 2013 WL 6074157 at *12 (citing *Perry*, 591 F.3d at 1141). Moreover, “the party seeking the
14 discovery must show that the information sought is highly relevant to the claims or defenses in the
15 litigation — a more demanding standard of relevance than under Federal Rule of Civil Procedure
16 26(b)(1).” *Perry*, 591 F.3d at 1141.

17 ANALYSIS

18 Under the first prong of *Perry*, Twitter has shown that revealing the identities of the anonymous
19 users raises the possibility of at least “arguable first amendment infringement.” *See Perry*, 591 F.3d
20 at 1140. Judging even from Music Group’s complaint, the Doe defendants’ allegedly defamatory
21 speech consists partly, and “arguably,” of criticisms of Music Group’s products. (*See Complaint -*
22 *ECF No. 2 at 10, ¶ 18.*) Such criticism can be legitimate, non-defamatory, and constitutionally
23 protected — and can be “chilled” if stripped of anonymity. *See Donziger*, 2013 WL 1402727 at *2-
24 *4 (quashing subpoena to reveal identity of anonymous critics of company’s environmental
25 practices).

26 The dispositive issue lies under *Perry*’s second prong. That is, the court must decide whether,
27 taking into account the various considerations that *Perry* sets out, Music Group’s need for the
28 requested information “outweighs” the potential harm to the Doe defendants’ First Amendment right

1 to anonymity. *See Perry*, 591 F.3d at 1140-41.

2 The court holds that, at this stage of the case and on this record, Music Group's interest in the
3 requested information does outweigh any infraction of the Doe defendants' right to speak
4 anonymously. First, the information sought is narrowly tailored to Music Group's need to serve
5 process. *See Perry*, 591 F.3d at 1141 ("The request must also be carefully tailored to avoid
6 unnecessary interference with protected activities . . ."). Music Group asks for only the "name,
7 address, email address and any proxy address" of the accounts' owners. (ECF No. 1 at 3; ECF No. 2
8 at 35, 41-45 (subpoenas).) That is the basic information that will allow Music Group to identify the
9 defendants and serve the complaint. This is unlike the request that was denied in *Donziger, supra*,
10 where Chevron sought protected information on multiple topics that were not "highly relevant" to
11 the litigation; the court in that case refused to enforce the subpoena as "overly broad." *See Donziger*,
12 2013 WL 1402727 at *5-*6. The court in *Art of Living, supra*, similarly distinguished a sweeping
13 discovery request from requests like Music Group's, where limited identifying information is sought
14 for the narrower purpose of effecting service. *See Art of Living*, 2011 WL 5444622 at *10.

15 The limited information that Music Group seeks is moreover "highly relevant" to its claims. *See*
16 *Perry*, 591 F.3d at 1141. This too is linked with Music Group's immediate need for the information:
17 to serve process. The identity of the Doe defendants is more than basically relevant to that need; it is
18 effectively indispensable.

19 The "nature" of the defendants' speech also weighs in favor of enforcing the subpoena. *See Art*
20 *of Living*, 2011 WL 5444622 at *5 (citing *Anonymous Online Speakers*, 2011 WL 61635 at *6). If
21 the defendants' speech raises "arguable" First Amendment concerns as corporate criticism, judging
22 from Music Group's complaint, the challenged speech goes beyond criticism into what appears to be
23 pure defamation, ostensibly unrelated to normal corporate activity, that accuses Music Group of
24 "support[ing] domestic violence, child abuse, and misogyny," and accuses Music Group's CEO of
25 "engag[ing] with prostitutes." (Complaint - ECF No. 2 at 6, ¶ 18; *see* ECF No. 1 at 7.) This is far
26 from the social and political criticism that has sometimes led courts to quash anonymity-breaking
27 subpoenas. *See Collingsworth*, 2013 WL 6074157 at *11-*18 (anonymous speech criticizing
28 company's human-rights record); *Donziger*, 2013 WL 1402727 at *2-*7 (company's environmental

1 practices); *Art of Living*, 2011 WL 5444622, *passim* (*bona fides* of spiritual organization).

2 Finally, courts have often allowed discovery “to ascertain the identity of Doe defendants in
3 “copyright infringement actions” involving anonymous Internet services. *See AF Holdings LLC v.*
4 *Doe*, No. 12-2206, 2012 WL 5464577, *2-*3 (E.D. Cal. Nov. 7, 2012) (collecting cases).

5 CONCLUSION

6 On balance, Music Group’s need for the requested information outweighs the impact on the Doe
7 defendants’ First Amendment right to speak anonymously. The court therefore grants Music
8 Group’s motion to enforce its Second Amended Subpoena, and orders Twitter to comply with and
9 produce the information that that subpoena requests. The court denies as moot Music Group’s
10 motion to transfer this proceeding to the Western District of Washington. To safeguard the Doe
11 defendants’ First Amendment rights, the court further orders the following procedures related to the
12 subpoena:

- 13 1. Twitter will have 30 days from the date that the Second Amended Subpoena is served upon it to
14 serve the Doe defendants with a copy of both the subpoena and this order. Twitter may serve the
15 Doe defendants using any reasonable means, including written notice sent to their last known
16 addresses, transmitted either by first-class mail or by overnight service.
- 17 2. The Doe defendants shall have 30 days from the date that the subpoena and this order are served
18 upon them to file any motions in this court contesting the subpoena (including a motion to quash
19 or modify the subpoena). If that 30-day period lapses without the Doe defendants contesting the
20 subpoena, Twitter shall have 10 days to produce to Music Group the information responsive to
21 the subpoena.
- 22 3. The subpoenaed entity shall preserve any subpoenaed information pending resolution of any
23 timely filed motions to quash.
- 24 4. Twitter shall confer with Music Group and shall not assess any charge in advance of providing
25 the information requested in the subpoena. If Twitter elects to charge for the costs of production,
26 it shall provide a billing summary and the cost reports that serve as a basis for such billing
27 summary for any costs that Twitter claims.
- 28 5. Music Group may use any information disclosed in response to the Second Amended Subpoena

solely for the purposes identified in its motion and supporting memoranda in this court.

This disposes of ECF Nos. 1 and 3.

IT IS SO ORDERED.

Dated: January 6, 2015



Laurel Beeler
United States Magistrate Judge